

extremity when she was “jumping some glasses out on the jumpline.” The claim form provided her work schedule. OWCP accepted a trapezius spasm and right shoulder impingement. Appellant filed an occupational illness claim in 1995 that was accepted for bilateral carpal tunnel syndrome.² She stopped work on June 23, 1997 and received compensation for total disability as of November 17, 1997 on the periodic tolls.

On September 23, 2002 appellant submitted a Form EN1032 with respect to her self employment, dependents and other benefits. She included a letter stating that she was babysitting part-time, earning \$400.00 per month. In an October 8, 2002 letter, appellant stated that she began babysitting in July 2002. By letter dated January 14, 2003, she indicated that she worked four hours per day, five days per week as a babysitter.

By decision dated March 20, 2003, OWCP found that appellant had been reemployed as a babysitter with wages of \$100.00 per week as of July 1, 2002. It stated, “In accordance with the provisions of 5 U.S.C. [§] 8106 and 5 U.S.C. [§] 8115, compensation has been reduced effective July 1, 2002.” The record does not indicate that appeal rights were provided.

In a November 8, 2005 Form EN1032, appellant indicated that she stopped babysitting in January 2005. She continued to receive reduced compensation based on the wage-earning capacity determination.

On March 24, 2010 appellant filed a claim for compensation (Form CA-7) commencing February 24, 2006. She was referred for a second opinion examination by Dr. William Somers, a Board-certified orthopedic surgeon. In a report dated August 18, 2010, Dr. Somers stated that appellant continued to have right shoulder problems causally related to the 1994 employment injury. He found that she could work four hours with restrictions.

By decision dated August 26, 2011, OWCP denied the claim for compensation from February 24, 2006. It found that the medical evidence did not establish that appellant could not perform the duties of a babysitter.

Appellant requested a hearing before an OWCP hearing representative, which was held on April 30, 2012. By decision dated September 10, 2012, the hearing representative affirmed the August 26, 2011 OWCP decision, finding that appellant worked as a babysitter from July 2002 until December 2004. The hearing representative found on basis for modification of the wage-earning capacity determination issued on March 20, 2003.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant’s ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it

² On both claim forms the work schedule checked seven days of work. The work shift appeared to be 6:00 a.m. to 1:00 p.m. or 1:00 p.m. to 7:30 p.m. A June 23, 1997 notice of personnel action indicated that appellant was a full-time employee.

remains undisturbed until properly modified.³ If the claimant requests a resumption of compensation for total wage loss, the request should be evaluated according to the criteria for modification of a wage-earning capacity determination.⁴

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

OWCP's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

"a. *Factors considered.* To determine whether the claimant's work fairly and reasonable represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2-900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.

"For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when--

(1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;

(2) *The job is seasonal* in an area where year-round employment is available....

(3) *The job is temporary* where the claimant's previous job was permanent."⁷

ANALYSIS

In the present case, OWCP issued a formal decision on March 20, 2003 finding that earnings as a part-time babysitter represented appellant's wage-earning capacity under 5 U.S.C.

³ See *Sharon C. Clement*, 55 ECAB (2004).

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (b) (October 2009).

⁵ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, *supra* note 4, Chapter 2.814.7 (October 2009).

§ 8115. When it uses part-time earnings, an initial question is raised as to whether this is appropriate under established procedures. As noted, a wage-earning capacity determination may be modified if the original determination was in error.

It is well established that a part-time position is not appropriate for a wage-earning capacity determination unless the claimant was a part-time worker at the time of injury.⁸ In *William Emory*, the claimant worked part time as a babysitter for his grandchildren. The Board found that the position was make shift in nature and not appropriate for a wage-earning capacity determination.⁹

In the September 10, 2012 decision, OWCP did not acknowledge Board precedent or OWCP's procedures on the part-time employment issue. The evidence of record establishes that at the time of injury appellant was a full-time employee. There is no evidence that she was a part-time employee. The Board finds that the 2003 wage-earning capacity determination was erroneous. Appellant has established a basis for modification of the 2003 decision.

CONCLUSION

The Board finds that appellant has established that modification of the March 20, 2003 wage-earning capacity determination is warranted.

⁸ See *S.C.*, Docket No. 12-1366 (issued January 4, 2013); *V.P.*, Docket No. 12-1034 (issued October 9, 2012).

⁹ 47 ECAB 365 (1996). The Board affirmed that aspect of the case that found an overpayment based on appellant's earnings.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 10, 2012 is reversed.

Issued: April 1, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board